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Supreme Court, U.S.
FILED

No 03 - 11

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In The

Supreme Court of the United States

George B. Ratcliff

Petitioner

v.

United States

Respondent

On Petition For Writ Of Certiorari
To the United States Court of Appeals for the
Federal Circuit

PETITION FOR WRIT OF CERTIORARI

George B. Ratcliff
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78 pp

QUESTIONS PRESENTED

1. Does failure of the agency to provide clear and accurate information in its Notice of Decision and does the agency's failure give Notice of Appeal rights in the manner and at the time prescribed by regulations deprive Mr. Ratcliff of his Fifth Amendment rights to due process of law?

2. Does false statements made by agency officials deprived Mr. Ratcliff of his Fifth Amendment rights to Due Process?

3. Does the failure of the agency to process the Petitioner's EEO compliant (file under Board regulation 1201.154) in accordance with 29 C.F.R. 1614 deprive Mr. Ratcliff of his Fifth Amendment rights to Due Process of law?

4. Does the Merits System Protection Board failure to recognize an EEO compliant lawfully filed and accepted by the EEO officer deprive Mr. Ratcliff of his Fifth Amendment rights to Due Process of law?

5. Does the decision in this case by the United States Court of Appeals for the Federal Circuit contradict decisions made by this court and decisions it has previously made in similarly situated case deprive Mr. Ratcliff' to equal protection?

LIST OF PARTIES

Merits Systems Protection Board

Department of Justice

CORPORATE DISCLOSURE STATEMENT

Not a corporation.

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The court of appeals' opinion and order in *Ratcliff v. MSPB, 02-3185* are unpublished, however, it has been reproduced in the appendix at pages A1 through A4.The Merit Systems Protection Board's opinion and orders in *Ratcliff v. Department of the Army* are reported at 91 MSPR 131 and reprinted in the appendix hereto at pages B5 through B35.

JURISDICTION

The court of appeals entered its judgment on February 5, 2003. Mr. Ratcliff filed a timely petition for rehearing on March 18, 2003, which was denied on April 1, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

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STATEMENT OF THE CASE

Course of Proceedings and Deposition at Administrative Agency

Mr. Ratcliff is a medical technologist and was promoted from the GS-9 level to the GS-l I level, effective January 5, 1997. The agency subsequently notified him that his promotion was not processed in conformity with its merit

promotion plan and that the GS- 11 position was misclassified. The agency proposed to cancel the promotion and return him to the GS-9 position. Mr. Ratcliff received a notice, which was undated, on April 15, 1997. On May 9, 1997, the agency issued a Notice of Decision canceling the promotion and returned Mr. Ratcliff to his prior position; the decision stated that the effective date of the cancellation was January 5, 1997, the date of the promotion.

The decision Notice advised Mr. Ratcliff of appeal rights as follows: "You have the right to appeal this decision to the Merit System Protection Board (MSPB) no later than thirty (30) days after the effective date of this action." The effective date in the Notice of Decision was January 5, 1997. At the time the agency reduced the appellant's grade and pay, the Board's regulations stated that an appeal of an action appealable to the Board was required to be filed "during the period beginning on the day after the effective date of the action being appealed and ending 30 days after the effective date." 5 C.F.R. 201.22(b) (1997).

Mr. Ratcliff filed an initial appeal of the agency's decision on August 25, 1998. The Acknowledgement Order raised the issue of the timeliness of the appeal. The Administrative Judge later determined that Mr. Ratcliff was entitled to a hearing on the issue of timeliness. Before the hearing was held, however, the agency and Mr. Ratcliff entered into a settlement agreement, and the appeal was dismissed pursuant to the agreement. Mr. Ratcliff filed a petition for review of the initial decision, which the Board denied, at the same time forwarding Mr.

Ratcliff's allegations of noncompliance with the settlement agreement to the Northeast Regional Merit Systems Protection Board Office for enforcement proceedings.

In the enforcement proceeding, the administrative judge concluded that the agency was not in full compliance with the settlement agreement and recommended that the Board grant Mr. Ratcliff's request to rescind the agreement and reinstate his appeal. The agency filed no response to the recommendation. Accordingly, on August 14, 2000, the Board vacated the initial decision dismissing the appeal pursuant to the settlement agreement and forwarded the case to this office for reinstatement of the appeal.

By reinstated appeal docketed August 16, 2000, Mr. Ratcliff challenged the legality of the May 9, 1997 decision of the Department of the Army, Fort Meade, Maryland, reducing him in grade and pay, effective January 5, 1997. The Merit Systems Protection Board (Board) has jurisdiction over this appeal, 5 U.S.C. 75 11, 7512, 7701.

A hearing was held on October 23, 2000, limited to the issue of timeliness, which was raised but not resolved in the initial appeal, and the record closed on that issue on November 22, 2000. The Administrative Judge rejected form 5496-R contained in the record that lawfully documented under signature by the legally appointed EEO officer stating that he accepted the EEO compliant filed in this matter. The Administrative Judge dismissed the appeal as untimely.

Mr. Ratcliff filed a timely Petition for Review of the Initial Decision on April 5, 2001 with the Merit Systems Protection Board and a Final Order was issued on January 29, 2002. The Final Order denied the Petition for Review and informed Mr. Ratcliff that he had the right to file an appeal of the Final Order with the United States Court of Appeals for the Federal Circuit (5 U.S.C. § 7703).

Proceedings in the Court of Appeals

Mr. Ratcliff filed a timely appeal of the final order with the United States Court of Appeals for the Federal Circuit on August 28, 2002. The court of appeals AFFIRMED the Decision of the Board on February 5, 2003. A timely petition for rehearing was filed on March 18, 2003. The court of appeals DENIED the petition for rehearing on April 1, 2003. Mandate issued on April 8, 2003

REASONS FOR GRANTING THE PETITION

This case has serious implications for all 1.875 million federal workers. This case before the court raises important questions about employee rights derived from agency regulations promulgated in response to congress enactment of federal law instructing agencies to prescribe regulations to carry out the requirements of law. The regulations give requirements as to what is required when a specific process is invoked. The regulatory requirements are to ensure Due Process as is required by Constitutional Amendment V. Additionally, the Due Process Clause of Amendment V ensures Equal Protection, although not specifically guaranteed by the

constitution the courts have held that in the absence of Due Process there can be NO Equal Protection. Federal employee depend on the federal laws and regulations they promote to protect them from illegal, irresponsible and mistaken acts taken against them. There is a need for federal workers to trust that when a statue or regulation provide certain rights in their procedures that those rights be complied with. When the regulations providing federal workers protection are violated, it is equally important that higher courts enforce these rights. Federal Employees are very dependent on congress and the courts to enforce their rights.

This court has continually held it would enforce employee rights derived from agency regulations. This court has consistently stated that it has a duty to enforce an agency regulation when the Constitution or federal law mandates compliance with the regulation; here the agency was mandated to follow Office of Personnel Management and Merits Systems Protection Board regulations. This court has found in a number of cases that has came before it that when regulations are invoked the regulations must be followed and that they would be enforced by this court. This court holding in the following cases confirms that: *Accardi v. Shaughnessy, 347 U.S. 260, Bridges v. Wixon, 326 U.S. 135, Columbia Broadcasting System, Inc. v. United States, 316 U.S. 407, 422, Morton v. Ruiz, 415 U.S. 199, 235, Service v. Dulles, 354 U.S. 363, United States v. Caceres, 440 U.S. 741(1979), United States v. White, 401 U.S. 745, Vitarelli v. Seaton, 359 U.S. 535, Yellin v. United States, 374 U.S. 109* Federal employees watch to see that agencies

comply with this court holdings. This case before the court emphasize the federal employee right to choose between two options in a regulation. The two options that existed were to filed and appeal in accordance with Board regulations 5 C.F.R. §1201.22 or part 1201.154. The Petitioner in this case choose the latter and filed a timely pre-compliant with the EEO office and subsequently the formal compliant with the agency. An appeal was filed with the Board only when the agency failed to act on the formal EEO compliant. To comply with Board regulations the appeal could not be filed with the Board until such time the EEO officer accepted the formal compliant of discrimination. After much delay due to processing irregularities. On the form 4596-R the EEO officer indicated in his own writing and under his signature that the EEO compliant was accepted as formal on June 22, 1998.

The appeal was filed with the Board on August 24, 1998, approximately sixty (60) days after the acceptance of the formal compliant. In accordance with Board regulations the appeal would have been premature if anything. The decision that the appeal was filed fifteen (15) months after the Notice of Decision and that the Petitioner did not exercise due diligence was not based on the circumstances of the case. The agency choose to defend itself in the appeal based on the appeal needed to be filed thirty (30) days from the date of the effective date. The Notice of Decision will be addressed separately. Based on the circumstances of the illegal and confusing Notice of Decision and the option available under Board regulation 5 C.F.R. § 12012.154, the Petitioner choose to file

the appeal under this part. This was a valid choice under the regulations

I. Ambiguous, defective Notice of Decision

Due diligence is not an issue in this case. The appeal to the Board was filed in accordance with Board regulations 1201.154, as will be discussed later. First the Petitioner's was deprived of his constitutional rights guaranteed by Amendment V of the Constitution of the United States. This guarantee is of Due Process rights and in this case before the court the Department of Army's failure to comply with regulation required by statue violates the petitioner's Due Process rights. The agency failed to provide notification in the manner and at the time prescribed by Office of Personnel Management and Merit Systems Protection Board's regulations. The agency's failure to follow the regulations resulted in the inability of the Petitioner to file a timely appeal under the circumstance involved. Due Process requires that once the process is determined by statue the petitioner have a statutory and Constitutional right to expect the agency to comply with the rules that lie within. The agency initiated a personnel action covered under 5 U.S.C. § 7513 (3)(4), and when an agency invoked this statue to carry out a personnel action the employee has a statutory right to appeal to the Merits Systems Protection Board (Board) 5 U.S.C. § 7513(d). When appealing to the Board the statue makes it clear that the appeal shall be processed in accordance with regulations prescribed by the Board 5 U.S.C. § 7701(a). The Petitioner had an

expectation that he could rely on the regulations to file an appeal to the Board.

Board regulations promulgated in response to 5 U.S.C. § 7514 effective in 1997 made it obligatory that the petitioner, as well as, the agency follow the procedures outlined in 5 C.F.R. 1201. Board procedures at 5 C.F.R 1201.21 requires that when an agency issues a decision that is appealable to the Board, the agency must give notice of appeal rights and the requirements of 5 C.F.R § 1201.22(c). Office of Personnel Management (OPM) regulation 5 C.F.R 752.404(f) promulgate in response to that same statue provides that the agency shall deliver the notice of decision to the employee at or before the time the action will be effective, and advise the employee of appeal rights. This case before the court raises issues of the agency's compliance with OPM and Board regulations and whether the Petitioner was deprived of Due Process protections guaranteed by the Constitution.

Whereas, the Board requires the petitioner to follow statues and regulations in submitting an appeal 5 U.S.C. § 7701 and 5 C.F.R. § 1201.22, the agency was allowed to violate the regulations with impunity. This court has held as in *Vitarelli v. Seaton, 359 U.S. 535.* that it would enforce any employee rights derived from agency's regulations

The regulations at 5 C.F.R § 1201.21, 5 C.F.R § 1201.22(b) (1997) and OPM regulation at 5 C.F.R. § 752.404(f) was intended that the agency inform the petitioner of his appeal rights at the time of the Notice of Decision. The Petitioner's compliance with the requirements of the regulations in filing

and appeal depended on the agency's delivering the Notice of Decision and Notice of Appeal rights in the manner and at the time prescribed by the regulations. The effective date contained in the notice had to meet regulatory compliance. The effective date stated in the May 9, 1997, Notice of Decision was January 5, 1997. This effective date was invalid because OPM regulations require that the Notice of Decision be delivered at or before the time the action will be effective 5 C.F.R. § 752.404(f). The effective date is the trigger for the time to begin to run. An effective date of January 5, 1997 would have started the time approximately one hundred and twenty four (124) days Prior to the Notice of Decision. This made it impossible to comply with Board regulations.

The Administrative Judge (AJ) ruled that the agency's Notice of Decision was ambiguous and therefore defective. The AJ findings preclude the Notice of Decision from being in compliance with Board regulations, therefore making the notice itself invalid. The invalid effective date precluded the petitioner from complying with the Board regulations at 5 C.F.R. 1201.22(b)(1)(1997). Board regulations in effect at the time the personnel action was initiated required that an appeal be filed within thirty (30) days of the effective date of the action. The personnel action being appealed was reduction in grade and pay. The effective date of the action as indicated by the May 9, 1997, Notice of Decision was January 5, 1997. To comply with the regulations the Petitioner would have to have filed the appeal by February 4, 1997, approximately three (3) months before receipt of the Notice of Decision. This made it impossible to comply with Board regulations and cause

considerable confusion, which resulted in the Petitioner filing an EEO compliant June 16, 1997.

5 U.S.C § 7513 provides that under regulations prescribed by the Office of Personnel Management (OPM), an agency may take an action covered by Section 7512 against an employee. The requirements of OPM regulation at 5 C.F.R. § 752.404(f) was not met. Additionally the requirements of OPM regulations at 5 C.F.R. § 511.701[12] preclude a retroactive effective date. Failure of the agency to observe the above-cited regulations and the statue 5 U.S.C § 7513 that obligates the agency to follow OPM regulations when taking the personnel action it took. The Board and the Court of Appeals erred because they were required by statue not to be sustained a Decision obtained without procedures required by law, rule, or regulation having been followed, 5 U.S.C. § 7701(c)(2)(A)(B)(C) and 5 U.S.C. § 7703(c)(1)(2)(3) respectively.

There are no provisions in OPM regulations or Board's regulations that provide for subsequent notification of appeal rights. Clarification of appeal rights is not part of OPM or the Board's regulations. If clarification is to occur then the clarification must be done in accordance with the regulations and would require the reissuing of the Notice of Decision, otherwise, any clarification made outside of the regulation is itself invalid. The agency asserted that it clarified the ambiguous defective and illegal Notice of Decision, which the Petitioner denies. Any clarification not in compliance with governing regulation denies the petitioner of his constitutional right of Due Process under the Amendment V. The regulations

requires that the employee be informed of appeal rights at the time the Notice of Decision is delivered.

In cases before the court of appeals where the notice of appeal rights were at issue the court has found that a ambiguous notice did not properly discharge the agency's notice obligation *(Walls v. Merits Systems Protection Board., 26 F.3D 1583 (Fed. Cir.1994)).* The court of appeals, also found that when an agency fail to give appeal rights in the form and manner prescribed by regulations; its failure to do so is generally the "critical and controlling fact" showing good cause for the delay. The court stated that it is not the alleged lack of diligence on the part of the petitioner but the flagrant violations of the regulation by the respondent *Shiflett v. United Postal Service., 839 F.2d 669(Fed. Cir. 1988).* The agency's defective Notice of Decision made it difficult to file an appeal with the effective date[3] given. Failure to provide clear and accurate information deprives the petitioner of his constitutional right under Amendment V, Due Process Clause.

The regulations at 5 C.F.R. 1201.22(b)(1997) were revised January 1, 1998 to include "an appeal must be filed no later than 30 days after the effective date, if any, of the action being appealed, or 30 days after the date of receipt of the agency's decision, whichever is later." (5 C.F.R. 1201.22 (b)(1998). The revision has no effect on this appeal because the personnel action, which triggered the requirements of 5 U.S.C. Sec. 7513, occurred on May 9, 1997. The regulations effective at the time of the initiation of the personnel action did not include, "30 days after the date of receipt of the

agency's decision, whichever is later." The petitioner relied on the regulations effective May 9, 1997.

Finally, OPM regulations at 5 C.F.R. § 511.701 states, "(a) Subject to Sec. 511.703, the effective date of a change in the classification of a position resulting from a classification appeal decision by either an agency or the Office is not earlier than the date of the decision and not later than the beginning of the fourth pay period following the date of the decision, except when a subsequent date is specifically provided in the decision. The agency has stated that the reason for the reduction in pay and grade is because the Petitioner's position was misclassified. To determine whether a previously classified position was misclassified the agency would have to make a classification decision and when that classification decision was made the agency was obligated to follow OPM regulations at 5 C.F.R. § 511.701 and 5 C.F.R. § 250.101.

The information contained in the Notice of Decision was inaccurate obtained not in accordance with governing regulations and caused much confusion prevented the Petitioner from filing an appeal under the circumstances. The flagrant violations of the regulations involved in this case present serious reasons the court should grant the Petition for Certiorari.

II. False statements made by agency officials

The Administrative Judge (AJ) abused his discretion when he found that the testimony of

the EEO intake officer (Ms Bunker) to be credible. The record contains a statement made by the EEO officer, who supervised Ms Bunker, that Ms Bunker had a history of being untruthful and preventing black men from exercising their appeal rights. The EEO officer also submitted documentation that showed that Ms Bunker had failed to process EEO complaints for as long as eighteen (18) months.

Ms Bunker stated under oath that she was not the one who processed the intake of the Petitioner's EEO compliant. The record contains a letter dated June 27, 1998 from the EEO officer that confirms that Ms Bunker was the intake officer on this EEO compliant and that she improper closed the EEO compliant. Ms Bunker also stated that she was not at work during the period from November 1997 thru January 1998, because she was absent due to the death of her husband. The formal EEO compliant was filed on January 27, 1998. Information in the record gathered by the Federal Bureau of Investigation (FBI) confirms that the testimony made by Ms Bunker was false. This information was not given to the Petitioner at the time of the hearing and the Petitioner had to contact the FBI in order to obtain the documents. The record contains a death certificate of Ms. Bunker's husband. Ms. Bunker's husband death was not during the period of November 1997 and January 1998 but his death was on June 3, 1998, he was not dead on January 1998, as Ms Bunker testified under oath. Her husbands death occurred several months later. The record contains time cards that shows that she was at work on the date the formal EEO compliant was filed. She failed to

process the EEO compliant according to regulations 29 C.F.R. § 1614 and she lied about her involvement in processing and receiving the formal compliant to cover up her mistakes. The court must look at the information obtained by the FBI and under motion supplemented the record. Ms Bunker committed several counts of perjury to cover for the fact that she failed to perform the duties of her job. This type of cover up was normal for Ms Bunker as stated by her supervisor. The AJ failed to properly consider evidence in arriving at his decision and is decision is not supported by the facts. The Board and the Court of appeals were required to not sustain the decision.

Ms Bunker committed perjury during her testimony that deprived the Petitioner of his Due Process rights. This court has held that where there has been perjury on a material issue that decision will not stand.

III. Board regulation procedures at 1201.22 and 1201.154

Once an appealable action under 5 U.S.C. § 7312 has been taken and the employee has the right to appeal to the Board under 5 U.S.C. § 7701, the employee is require to follow Board regulations in filing the appeal, Board regulations becomes the controlling procedures. Under Board regulations the employee has two options as provided by 5 C.F.R. § 1201.22 and 5 C.F.R. § 1201.154.

As stated previously under the heading "Ambiguous, defective Notice of Decision", the

petitioner was prevented from filing a timely appeal under this procedure because of the inaccurate, illegally information contained in the defective Notice of Decision. The confusing nature of the Notice of Decision made it impossible to comply with Board regulations.

The petitioner utilized the second option and invoked procedure 5 C.F.R. § 1201.154. The Petitioner filed a timely pre-compliant of discrimination with the agency. Once a compliant of discrimination is filed with the agency; the agency is obligated to process the compliant according to 29 C.F.R § 1614. Due to the agency's delays, extension and improper processing of the pre-compliant a formal compliant was not filed until January 27, 1998. The EEO officer appointed by the agency in accordance with 29 C.F.R. § 1614.102(b)(3) had the authority to dismiss or accept complaints of discrimination 29 C.F.R. § 1614.107. The EEO officer accepted the formal compliant of discrimination on June 27, 1998. According to Board regulation 5 C.F.R. § 1201.154, if the appellant has filed a timely formal compliant an appeal must be file within thirty (30) days after the appellant receives the agency resolution or final decision on the discrimination issue or If the agency has not resolved the matter or issued a final decision on the formal complaint within One hundred twenty (120) days, the appellant may appeal the matter directly to the Board at any time after the expiration of 120 calendar days.

Having filed a timely compliant of discrimination and having waiting 120 days since the filing of the formal EEO compliant[4] and no final decision by

the agency. The Petitioner had a Due Process right to filed an appeal with the Board. The appeal was timely filed because the agency never made a final decision on the formal EEO complaint. The EEO officer was the first to advised the petitioner of his rights to appeal with the Board under Board regulations 5 C.F.R. § 1201.154.

The petitioner followed all regulations and procedures in filing and appeal and relied on the Board to follow its regulations and because of the failure of the Board to follow its own procedures and failure to give Due Process the court should grant the Petition for Certiorari.

IV. Court of appeals erred in its decision and its decision deprives the Petitioner of Equal Protection.

The court of appeals failed to consider in rendering its Decision that the petitioner filed a timely appeal to the Board under Board regulations 5 C.F.R. § 1201.154. If the court of appeals had considered this fact the court of appeals would have found that the Board's decision dismissing the appeal for lack of due diligence was made in error and was not supported by the facts in this case. The regulations at 1201.154 states that an appeal can be filed any time after the expiration of 120 days if no final decision was made. The formal appeal was filed January 27, 1998 and one hundred twenty (120) days would have ended approximately May 27, 1998. The appeal was filed within thirty (30) days from the meeting with the EEO officer on August 4, 19978. On that date the

EEO officer was the first to inform the Petitioner about his right to file and appeal to the Board under Board regulation 1201.154. No final decision has ever been made on the formal EEO compliant.

The court of appeals failed to find that the record contains several letters from the petitioner asking for help of the EEO officer and the EEO commission in the processing of the EEO compliant because the counselor of record was mishandling the compliant and at on point loss the compliant entirely. At no time did the Petitioner abandon his EEO compliant. The EEO officer was contacted and under his legal authority accepted the complaint of discrimination as formal on June 22, 1998[5]. The formal compliant was actually filed on January 27, 1998. The EEO officer had the authority under 29 C.F.R. § 107The petitioner was prevented from filing an appeal with the Board any sooner than the time the EEO officer accepted the formal EEO compliant.

The EEO office was obligated to process the EEO complaint according to 29 C.F.R. § 1614. The agency's EEO office failed to follow the procedures outlined in 29 C.F.R. § 1614 which caused a delay in every step of the process. The petitioner could only follow the procedures as they were outlined in the regulations. The petitioner depended on the regulations and the agency to follow the regulations in the processing of the EEO complaint from start to finish.

The petitioner was legally entitled to file an appeal with the Board under Board procedure 5 C.F.R. §

1201.154 and because the appeal was timely filed under governing regulations the court should grant the Petition for Certiorari.

Finally the court of appeals' decision contradicts decisions it has previously made. In this case the petitioner was given an ambiguous, defective[6] and therefore invalid Notice of Decision, which prevented a timely filing of an appeal under procedure 5 C.F.R. § 1201.22(b)(1997). The court of appeals held in *Walls v. Merits Systems Protection Board., 26 F.3D 1583(Fed. Cir.1994)*, that "the agency's decision letter was sufficiently ambiguous under the circumstances to not properly discharge the agency's notice obligation, see *Walls. 29 F.3d at 1583*, the court noted as *Walls* instructs, "we do not expect a pro se litigant to be made to jump through a confusing array of procedural hoops." *Id., citing Mendoza v. Merits Systems Protection Board, 966 F.2d 650, 653(Fed. Cir. 1992)*. The court of appeal's Decision also contradicts its holding in *Shiflett v. United Postal Service., 839 F.2d 669(Fed. Cir. 1988)*; here the court emphasized that where, as is here, an agency takes an action that is clearly appealable to the Board, it has a obligation to provide detailed information regarding Board appeal rights, as required by the Board's regulations, and its failure to do so is generally the "critical and controlling fact" showing good cause for the employee's filing delay .....is not the alleged lack of diligence on the part of the petitioner, but the flagrant violation of the regulations by the respondent in failing to give petitioner notice of her appeal rights in the form and manner prescribed by the regulations at the time the ... decision [on appealable action] was issued.

In cases where other petitioners equally situated and their cases went before the court of appeals that court found that an ambiguous notice and failure to give notice resulted in a reversal of the agency's decision. In this case, however, the ambiguous defective notice, which equate to failure to give notice received a different outcome, which amounts to denial of Equal Protection. Denial of Equal protection under the circumstances also denies the petitioner of Due Process.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,
George B. Ratcliff
June 25, 2003

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[2] The reason the agency gives for taken the personnel action is that there was a classification error. Classification manners are governed by OPM regulations.

[3] The actual effective date was July 22, 1997. This effective date never appeared in the notice of decision and the petitioner was never informed of it.

[4] The original formal EEO complaint was filed on January 27, 1998. Due agency delays the EEO officer accepted the formal compliant on June 22, 1998.

[5] The EEO officer accepted the compliant under signature on form 4596-R and latter submitted a statement verifying that the compliant was accepted.

[6] Finding made by the Administrative Judge.

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. This disposition will appear in tables published periodically.

United States Court of Appeals for the Federal Circuit

02-3185

GEORGE B. RATCLIFF,

Petitioner,

V.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

DECIDED: February 5, 2003

Before MAYER, Chief Judge, MICHEL and DYK, Circuit Judges. PER CURIAM.

George B. Ratcliff appeals the final decision of the Merit Systems Protection Board, No.

APPENDIX A

PH0752980413-I-2, dismissing his appeal as untimely. Because the board did not abuse its discretion in concluding that good cause was not shown for waiver of the time limit, we affirm.

Ratcliff is a medical technologist GS-9 with the Department of the Army. Effective January 5, 1997, he was promoted to the GS-1 I Level. Shortly thereafter, the Department of the Army issued a Notice of Decision dated May 9, 1997, notifying Ratcliff that his promotion was not processed in conformity with its merit promotion plan, and that it proposed to cancel the promotion, retroactively effective January 5, 1997. On August 25, 1998, Ratcliff filed an appeal of the Department of Army's promotion cancellation action. The administrative judge ("AJ") dismissed the appeal as untimely.

We must affirm the decision of the board unless we find that it is: "(I) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. § 7703(c) (2000). The board will dismiss an untimely appeal "unless a good reason for the delay is shown" and the board waives its deadline. 5 C.F.R. § 1201 .22(c) (2002). Whether the regulatory time limit for an appeal should be waived upon a showing of good cause is a matter committed to the board's discretion, and we will not substitute our judgment. Mendoza v. Merit Sys. Prot. Bd., 966 F.2d 650, 653 (Fed. Cir. 1992) (en banc). The appellant bears the burden of establishing good

cause. Phillips v. United States Postal Serv., 695 F.2d 1389, 1391 (Fed. Cir. 1982).

Ratcliff challenges the AJ's credibility determinations with respect to the clarification of his appeal rights in June of 1997. Mildred Bunker, Equal Employment Office intake counselor, and Janine Sinclair, head of personnel at Fort Meade, both testified that Ratcliff's appeal rights were clarified in June of 1997, when Bunker telephoned Sinclair, with Ratcliff present, to explain that his time for appeal ran from the date of the decision, not the cancellation date of his promotion. The AJ found both witnesses' testimony credible, and we review such credibility determinations with deference. Bieber v. Dep't of the Army, 287 F.3d 1358, 1364 (Fed. Cir. 2002). We see no basis in the record to justify disturbing the AJ's credibility determinations.

Ratcliff argues that the delay should have been excused because the Department of the Army did not provide him with a clear and accurate notice of his appeal rights. We have recognized that even when an employee is not provided with notice of appeal rights by an employing agency, a dismissal based on untimeliness may be proper if the employee fails to act promptly and within the allowable time limits after he becomes aware of those rights. Gordy v. Merit Sys. Prot. Bd., 736 F.2d 1505, 1508 (Fed. Cir. 1984). The AJ examined the circumstances here and determined that Ratcliff's filing of his appeal some fifteen months after he received clarification of his appeal rights in June of 1997, did not demonstrate due diligence. The board's decision was not arbitrary,

capricious, an abuse of discretion, or otherwise not in accordance with law.

UNITED STATES OF AMEIUCA
MERIT SYSTEMS PROTECTION~BOARD
NORTHEASTERN REGIONAL OFFICE

GEORGE B RATCLIFF, Appellant, V. DEPARTMENT OF THE ARMY Agency.	DOCKET NUMBER PH-0752-98-041344-1 DATE November 17 1998

George B. Ratcliff, Glen Burnie, Maryland, pro se.

Vincent D. Zahnle, Fort Meade, Maryland, for the agency,

BEFORE

Michael H. Garrety
Administrative Judge

INITIAL DECISION

By appeal postmarked August 25, 1998, George B. Ratcliff challenged the May 9, 1997 decision of the Department of the Army, Fort Meade, Maryland, reducing him in grade and pay, from GS-1 1 to GS-9, effective January 5, 1997. The Merit Systems Protection Board (Board) has jurisdiction over this appeal 5 U S C §§ 7511-7513, 7701.

APPENDIX B

For the reasons set forth below, this appeal is DISMISSED.

SETTLEMENT

The Parties informed me during a conference call this date that they had entered into a settlement agreement. Conference Tape (CT). They also informed me that it was their intention that the agreement be made a part of the record and enforceable by the Board. CT. *See Burton v. Department of Health & Human Services*, 45 M.S.P.R. 37, 39 (1990). Settlements that are formally entered into the record may later be enforced by the Board. *See Cranfield v. Tennessee Valley Authority*, 44 M.S.P.R. 384, 389 (1990); 5 C.F.R. § 1201.4i(c)(2)(i) (1998).

I have reviewed the terms of the settlement, Initial Appeal File, Tab 12, and find it lawful. I further find, after inquiry on the record, that the settlement was voluntarily entered into and that the parties understand its terms. CT. Accordingly, the settlement is approved and made a part of the record. Since the appeal has been settled before the Board has reached a decision on the matter, and the settlement agreement provides that the appeal shall be withdrawn, the appeal is dismissed from further consideration. *See Jackson v. Department of the Air Force*, 45 M.S.P.R. 483, 484 (1990).

DECISION

The appeal is DISMISSED.

FOR THE BOARD "s/_____"
Michael H. Garrety
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on September 22 1923, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if this initial decision is received by you more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review if you believe that the settlement agreement is unlawful, was involuntary, or was the result of fraud or mutual mistake. Your petition, with supporting evidence and argument, must be filed with:

The Clerk ot the Board
Merit Systems Protection Board
1120 Vermont Avenue, NW., Room 806

Washington, DC 20419

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be postmarked, faxed, or hand-delivered no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. if you fail to provide a statement with your petition that you have either mailed, faxed, or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Boards final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar days after the date this initial decision becomes final.

ENFORCEMENT

The settlement agreement has been made part of the record. If you believe the agency has not fully complied with the terms of the agreement after this initial decision has become final, you may ask the Board to enforce the settlement agreement by filing a motion WITH THIS OFFICE.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

GEORGE B. RATCLIFF, Appellant
DOCKET NUMBER PH-0752-98-0413-I-1

V.
DATE: JUNE 3, 1999

DEPARTMENT OF THE *ARMY*, Agency.

George B. Ratcliff, Glen Burnie, Maryland, pro se.

Vincent D. Zahnle, Fort Meade, Maryland, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavert, Vice Chair
Susanne T. Marshall, Member

ORDER

The appellant has petitioned for review of an initial decision dated November 17, 1998, that dismissed his appeal pursuant to a settlement agreement that was entered into the record for failure to meet the criteria for review set forth at 5 C.F.R. § 1201.115 and FORWARD the appellant's allegations of noncompliance with the settlement agreement to the regional office for consideration as a petition for enforcement.

In the petition for review the appellant alleges for the first time that the agency has not complied with the terms of the settlement agreement. In particular, the appellant alleges that the agency has breached this settlement agreement because it refused to: (1) make the agreed-upon settlement payment; (2) remove fabricated adverse information from his local personnel file: and (3) issue a standard form (SF)-50, indicating that he completed one year of service at the GS-11 level. It is well settled that allegations that a party has breached a settlement agreement which has been entered into the record of an appeal for enforcement purposes are properly a matter for initial consideration by the appropriate regional or field office. *Cook v. Government Printing Office*, 75 M.S.P.R. 8, 10-11, *aff'd*, 132 F.3d 51 (Fed. Cir. 1997); *see also* 5 C.F.R. § 1201.115. Accordingly, we FORWARD the appellant's allegations of noncompliance with the settlement agreement to the regional office for consideration as a petition for enforcement.

This is the final order of the Merit Systems Protection Board with respect to the initial decision dismissing the appellant's appeal. *See* 5 C.F.R. § 1201.113(c).

NOTICE TO THE APPELLANT REGARDING FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD: "s/_____"
Robert E. Taylor
Clerk of the Board

Washington, D.C.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

GEORGE B. RATCLJFF,
Appellant,

DOCKET NUMBER
PH-0752-98-0413-X-1

V.

DATE: AUGUST 14. 2000

DEPARTMENT OF THE ARMY,
Agency.

George B. Ratcliff, Glen Burnie, Maryland, pro Se.

Vincent D. Zahnle, Fort George G. Meade, Maryland, for the agency.

BEFORE

Beth S. Slavet, Acting Chairman
Susanne T. Marshall, Member

OPINION AND ORDER

This case is before the Board on the administrative judge's recommendation finding the agency in noncompliance with the parties' settlement agreernent. *Ratcliff v. Department of the Army*, MSPB Docket No. PH-0752-98-0413-C-1 (Recommendation, Oct. 8, 1999); Compliance File (CF), Tab 17. Specifically, administrative judge found that the agency failed to remove derogatory information about the appellant from its unofficial local personnel files, as required by the agreement. *Id.* at 10. The administrative judge

noted the appellant's request that the settlement agreement be rescinded. *Id.* The administrative judge recommended that, upon returning the agency to the status quo ante, the appellant be permitted to rescind the settlement agreement and reinstate his appeal. *Id.* at 10-11. The administrative judge notified the agency that if it disagreed with his recommendation, it must file a brief supporting its nonconcurrence in the recommendation within 30 days after the recommendation is issued. *Id.* at 11. The agency has not filed such a submission with the Board. Accordingly, the initial decision dismissing the appeal pursuant to the settlement agreement is VACATED and the case is FORWARDED to the Northeastern Regional Office for reinstatement of the appeal. The appellant is ORDERED to reimburse the agency for any payments he received in connection with the settlement agreement. In the event that immediate reimbursement does not occur, the Board has the authority to enforce compliance at the conclusion of Board proceedings on the appeal. *Stipp v. Department of the Army*, 64 M.S.P.R. 124, 128 (1994), *overruled on other grounds by Wisdom v. Department of Defense*, 78 M.S.P.R. *652, 656* (1998).

This is the final order of the Merit Systems Protection Board in this enforcement proceeding. 5 C.F.R. § 120 1.183(b).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review

this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law as well as review other related material at our web site, www.mspb.gov.

FOR THE BOARD: "s/_____"
Robert E. Taylor
Clerk of the Board

Washington, D.C.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

GEORGE B. RATCLIFF,
Appellant,

DOCKET NUMBER
PH0752-98-0413-I-2

V.

DATE: AUGUST 16, 2000

DEPARTMENT OF THE ARMY,
Agency.

ACKNOWLEDGMENT ORDER

By Opinion and Order of the Board, dated August 14, 2000, this case is reinstated. I am the administrative judge assigned to this appeal and all submissions filed hereafter shall be directed to me. A copy of the Opinion and Order reinstating this appeal is enclosed with this order.

The parties are advised that the prior Board record in this matter, MSPB Docket No. pH-0752-98-0413-I-1, may be referred to during the adjudication of this appeal. Accordingly, any documents previously submitted by either party in connection with the original appeal should not be resubmitted.

If they have not already done so, within 15 calendar days of the date of this Order, the parties shall confer to define the issues, agree to stipulations, and discuss the possibility of settlement. I am available to assist in the discussions. The parties must communicate concrete, specific settlement proposals within 5

days of their conference unless either party concludes in good faith that no compromise of any kind is possible. You must also be prepared to discuss with me the status of your settlement discussions.

The appellant may name a representative. If the appellant already has a representative, he/she must fill out the enclosed "Designation of Representative" form and file it with the Board and with the agency within 10 calendar days of the date of this Order. i~ you name a representative, after receiving this Order, fill out the enclosed "Designation of Representative" form and file it with the Board and the agency immediately after obtaining your representative.

The appellant must immediately notify the Board and the agency in writing of any changes in the name, address, or telephone number of your designated representative.

The agency must designate a representative. I ORDER the agency to file the name, address, and telephone number of the person authorized to act for the agency on the enclosed "Designation of Representative" form within 20 calendar days of the date of this Order. The representative must have authority to settle this appeal or be able to directly reach someone with that authority on short notice.

FOR THE BOARD: "s/_____"
Michael H.Garrety
Administrative Judge

Enclosure

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
NORTHEASTERN REGIONAL OFFICE

GEORGE B. RATCLIFF
Appellant,

DOCKET NUMBER
PH-075298041 3-1-2

v.

DEPARTMENT OF THE ARMY,
Agency

DATE:
March 2, 2001

George B. Ratcliff, Glen Burnie, Maryland, pro Se.

Thomas Auble, Esquire, Fort George G. Meade, Maryland, for the agency.

BEFORE Michael H. Garrety, Administrative Judge

INITIAL DECISION

INTRODUCTION

By reinstated appeal docketed August 16, 2000, George B. Ratcliff challenged the May 9, 1997 decision of the Department of the Army, Fort Meade, Maryland, reducing him in grade and pay, effective January 5, 1997. The Merit Systems Protection Board (Board) has jurisdiction over this appeal. 5 U.S.C. §~ 7511, 7512, 7701. A hearing was held on October 23, 2000, limited to the issue of timeliness, which was raised but not resolved in the initial appeal, *see* Reinstated Appeal File (RAF), Tabs 5, 12, 15, and the record closed on

that issue on November 22, 2000. For the reasons set forth below, this appeal is DISMISSED.

TIMELINESS

Background

The appellant is a medical technologist and was promoted from the GS-9 level to the GS-1 I level, effective January 5, 1997. Initial Appeal File (IAF), Tab 4, Subtab 4g. The agency subsequently notified him that his promotion was not processed in conformity with its merit promotion plan, that the GS- 11 position was misclassified in any event, and that it proposed to cancel the promotion and return him to the GS-9 position. *Id.*, Subtab 4e. The appellant received the notice, which is undated, on April *15*, 1997. *Id.*, Tab 1. On May 9, 1997, the agency canceled the promotion and returned the appellant to his prior position; the decision stated that the effective date of the cancellation was January 5, 1997, the date of the promotion. Concerning appeal rights, the decision advised the appellant as follows: "You have the right to appeal this decision to the Merit System[s] Protection Board (MSPB) no later than thirty (30) days after the effective date of this action." *Id.*, Tab 4, Subtab 4c.

The appellant filed an initial appeal of the agency's decision on August *25*, 1998. The Acknowledgement Order raised the issue of the timeliness of the appeal, and I later determined that the appellant was entitled to a hearing on that issue. *Id.*, Tab *5*. Before the hearing was held, however, the parties entered into a settlement agreement, and the appeal was dismissed pursuant to the agreement. *Id.*, Tab 14 (Initial

Decision, Nov. 17, 1998). The appellant filed a petition for review of the initial decision, which the Board denied, at the same time forwarding the appellant's allegations of noncompliance with the settlement agreement to this office for consideration as a petition for enforcement. Compliance File (CF), Tab 1 (Order, June 3, 1999).

In the enforcement proceeding, I concluded that that agency was not in full compliance with the settlement agreement and recommended that the Board grant the appellant's request to rescind the agreement and reinstate his appeal. CF, Tab 17 (Recommendation, October 8, 1999). The agency filed no response to the recommendation. Accordingly, on August 14, 2000, the Board vacated the initial decision dismissing the appeal pursuant to the settlement agreement and forwarded the case to this office for reinstatement of the appeal. RAF, Tab 1 (Opinion and Order, August 14, 2000).

Burden of proof

The appellant has the burden of proof, by a preponderance of the evidence, on the issue of the timeliness of the appeal. 5 C.F.R. § 1201.56(a)(2)(ii) (2000). A preponderance of the evidence is defined as that degree of relevant evidence that a reasonable person, considering the record as a, whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.5 C.F.R. § 1201.56(c)(2) (2000).

The appeal is untimely.

At the time the agency reduced the appellant's grade and pay, the Board's regulations stated that

an appeal of an action appealable to the Board was required to be filed "during the period beginning on the day after the effective date of the action being appealed and ending 30 days after the effective date." 5 C.F.R. § 1201.22(b) (1997). By the time the appellant filed his appeal, § 120 1.22(b) had been amended to provide that an appeal must be filed within 30 days of the effective date of the action being appealed, or within 30 days of the receipt of the agency's decision, whichever is later. *See* 5 C.F.R. § 1201.22(b) (1998).[1] Also, under 5 C.F.R. § 1201.154(b) (1998), an appellant who filed a timely, formal complaint of discrimination with his agency in connection with a matter otherwise appealable to the Board could appeal to the Board within 30 days after receiving the agency resolution or final decision on the discrimination issue, or, if the agency had not resolved the matter or issued a final decision on the formal complaint within 120 days, could appeal the matter directly to the Board at any time after the expiration of 120 days.

There is no dispute that, under § 1201.22, this appeal, filed in August 1998, was untimely by approximately 1 5 months. The appellant raised a claim of discrimination in his petition for appeal, however, and although he indicated in his petition that he had not filed a formal complaint of discrimination concerning his reduction in grade

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[1] The amendment did not make a substantive change to the regulation; it simply made explicit the interpretation theretofore given the regulation by the Board and the Court of Appeals for the Federal Circuit. *See, e.g., Alejandro v. Department of the Navy*, 64 M.S.P.R. 506, 508 (1994).

and pay, he stated in a cover letter accompanying his petition that he had raised the issue of his demotion, as part of a continuing pattern of discrimination, in an EFO complaint he filed in January 1998. IAF, Tab 1. Thus, I must address whether the appeal is timely under § 1201.154. *See* RAF, Tab 16 (Order, October 24, 2000).

Concerning that issue, the appellant now contends that he indeed filed a formal complaint of discrimination about his reduction in grade and pay in January 1998. He testified that initially, in June 1997, he contacted Mildred Bunker, an employee in the agency's EEO office, about the possibility of filing a complaint; that in November 1997 he learned a white employee had complained about his promotion and that discrimination may have been a factor in his subsequent demotion; that in January 1998, he again contacted Ms. Bunker, about a time-off award given to other employees in his work unit, and filed an EEO complaint; that the issue of his demotion was included in the discussions of that complaint; that Ms. Bunker failed to process the complaint properly; that he later spoke to Fred Cross, the head of the EEO office, about her mishandling of the complaint; and that Mr. Cross informed him of his right of appeal to the Board. Hearing Tape (HT) 1A; *see also* RAF, Tabs 19, 31 (written submissions).

Ms. Bunker disputed many of the appellant's claims in her testimony. She stated, for example, that the appellant did not speak to her about EEO issues in June 1997; that she did not handle the intake process for his complaint in January 1998 because she was absent from work at that time

due to the death of her husband; and that during discussions of his complaint in February and March 1998, no reference was made to the appellant's demotion. HT 1B; *see also* RAF, Tab 30 (affidavit dated November *15*, 2000). As will be seen, however, to resolve whether this appeal is timely under § 1201.154, I need not make credibility findings concerning these conflicting accounts.

The parties submitted as a joint exhibit the EEO file in question. RAF, Tab 17. The file indicates that the appellant filed an informal complaint, in January 1998. According to the intake forms, the informal complaint involved the time-off award, but the file contains also documents relating to the demotion. Whatever issues the informal complaint may eventually have encompassed, there is no formal EEO complaint document in the file, however. I find, based on my review of the file, that the informal complaint never proceeded to the formal stage, nor was it treated by the agency as a formal complaint. Although on June 18, 1998, the appellant sent a memorandum to Mr. Cross asking for assistance in resolving the informal complaint or sending it to the formal stage, and apparently in response to that memorandum, a notation was made on the complaint chronology, DA Form *5495-R*, that a formal complaint was accepted on June 27, 1998, other documents in the file demonstrate that the notation is erroneous. Mr. Cross sent the appellant a letter that same date, explaining how the counseling process would be completed and inquiring whether the appellant wished to enter the formal process. The appellant responded to that letter on August 14, 1998, stating that he did

not wish to file a formal complaint or pursue the matter further.

Thus, even assuming the informal complaint concerned the demotion as well as the time-off award and therefore involved mixed case issues, *see, e.g., Lang v. Merit Systems Protection Board*, 219 F.3d 1345, 1347 (Fed. Cir. 2000), the appellant never pursued a formal complaint of discrimination with the agency. In the absence of a formal complaint of discrimination, his appeal to the Board is also untimely under § 1201.154(b).[2]

Good cause has not been shown for the untimeliness of the appeal.

The time limit for filing an appeal may be waived upon a showing of good cause for the delay. 5 C.F.R. § 120 1.22(c) (1998). To determine whether an appellant has shown good cause, the Board will consider the length of the delay, the reasonableness of his excuse and his showing of due diligence, whether he is proceeding pro se, and whether he has presented evidence of the existence of circumstances beyond his control that affected his ability to comply with the time limits or of unavoidable casualty or misfortune that similarly shows a causal relationship to his inability to timely file his petition. *Moorinan v. Department of* 1/ic *Arm)*, 68 M.S.P.R. 60, 62-63

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[2] In light of my disposition of this issue, I need not address the agency's alternative argument that the appeal to the Board is untimely under § 1201.154(b) because the appellant did not invoke the EEO process with respect to his demotion in a timely manner.

(1995), *aff'd*, 79 F.3d 1167 (Fed. Cir. 1996) (Table); *Alonzo v. Department of the Air Force*, 4 M.S.P.R. 180, 184 (1980).

The appellant principally contends that, if his appeal is untimely, good cause exists for the delay, because the agency did not properly inform him of his appeal rights. As noted above, the May 9, 1997 decision canceling his promotion to the GS-1 1 level and returning him to GS-9 level stated that the effective date of the cancellation was January 5, 1997, the date of the promotion, and advised him that he could appeal the decision to the Board no later than 30 days after "the effective date of this action." JAF, Tab 4, Subtab 4c. He testified that upon receiving the decision, it appeared to him that, notwithstanding the notification that he had appeal rights to the Board, the time for an appeal had already expired, because more than 30 days had passed since January 5, 1997. HTIA.

Thus, he immediately contacted Janine Sinclair, the head of the personnel office at Fort Meade, and asked her if the deciding official intended the effective date of the cancellation of the promotion to be January 5, 1997. She confirmed that the deciding official wanted the cancellation to be retroactive to the date of the promotion. The appellant next telephoned the Office of Personnel Managements but OPM referred him to the Board. Accordingly. he called the Northeastern Regional Office, and he spoke to an administrative judge. He told her that the effective date of the cancellation of the promotion was January 5, 1997, and she responded that if the effective date was January 5, it appeared he missed the date for

an appeal. After learning from the Board that an appeal would be untimely, he did not pursue the matter. When Mr. Cross advised him in August 1998 that he had appeal rights to the Board, he immediately filed his appeal. HTIA; *see also* IAF, Tabs 1, 3 (further description of conversation with administrative judge).

I agree that the notice of appeal rights in the agency's May 9, 1997 decision is ambiguous on its face: The phrase "the effective date of this action" could refer to May 9, the date of the decision, or to January 5, the date of the cancellation of the promotion. Whether the latter interpretation is a reasonable interpretation is questionable, in my view, since such a construction of the notice would render wholly nugatory the appeal rights about which the appellant was being advised. He himself apparently had difficulty believing that such an interpretation, although a possible one, was the intended one. *See, e.g., Lourie v. US. Postal Service*, 82 M.S.P.R. 119, 123 (1999) (there must be a reasonable basis for a claim of confusion). Nevertheless, I will assume for purposes of adjudication that the notice of appeal rights was genuinely confusing and therefore defective.

That does not end the matter, however. Even where an agency fails to satisfy its notice obligation, the employee has an obligation to exercise due diligence to pursue his appeal rights once he becomes aware of them. *See, e.g., Herring v. U.S. Postal Service*, 72 M.S.P.R. 438, 443 (1996). The agency contends that the nature of the appellant's appeal rights was clarified in early June 1997. According to Ms. Bunker and

Ms. Sinclair, the appellant came to Bunker's office with a question about the appeal deadline. While he remained in her office, Bunker telephoned Sinclair, who told Bunker that the time for appeal ran from date of the decision, not the date of the cancellation of the promotion, and that the time for appeal was close to expiring. As Bunker and Sinclair were speaking, Bunker was relaying to the appellant the information Sinclair was providing. Bunker advised the appellant to speak directly with Sinclair as well. Sinclair stated that the appellant never contacted her directly about that matter, although he twice asked her about his potential liability for a salary overpayment resulting from the retroactive nature of the adverse action. HT 1B.

The appellant had a different recollection. He testified that he did speak with Ms. Bunker in June 1997, but only by telephone and only about the possibility of filing an EEO complaint, and that Bunker did not contact Sinclair at that time. He believed that the conversation described by Bunker and Sinclair took place in January 1998, when he went to Bunker's office to file his informal EEO complaint about the time-off award and also brought up his demotion, after which she contacted Sinclair about the demotion. He volunteered that during his June conversation with Bunker, she advised him to pursue an appeal with the Board. HT 2A.

To resolve credibility issues, an administrative judge must identify the factual questions in dispute, summarize the evidence on each disputed question, state which version he believes, and explain in detail why he finds the

chosen version more credible, considering such factors as: (1) the witnesses opportunity and capacity to observe the event or act in question; (2) the witness's character; (3) any prior inconsistent statement by the witness; (4) a witness's bias, or lack of bias; (5) the contradiction of the witness's version of events by other evidence or its consistency with other evidence; (6) the inherent improbability of the witness's version of events; and (7) the witness's demeanor. *Hillen v. Department of the Army, 35* M.S.P.R. 453, 458 (1987). Here, there are a number of factors that persuade me to credit the testimony of Ms. Bunker and Ms. Sinclair over the testimony of the appellant.

First, Ms. Bunker's and Ms. Sinclair's testimony is corroborated by the testimony of each other, and Bunker's testimony is consistent with an affidavit she prepared in connection with this appeal. JAF, Tab 4, Subtab 4b. The appellant's testimony is uncorroborated. Second, I find it more plausible that a discussion about the time for appealing to the Board occurred in June 1997 than in January 1998. Although Ms. Bunker worked in the EEO office, I also find it more plausible that the appellant approached her in June 1997 with a question about filing his appeal, as she contended, than about filing a discrimination complaint, as he claimed, since he testified that he first become aware of a basis for such a complaint in November of that year. I have carefully considered the appellant's assertion that Ms. Bunker's testimony should be disregarded because he challenged her handling of his EEO complaint and because Mr. Cross, her former supervisor, avers that she has a reputation for

untruthfulness, *see* RAF, Tab 24 (statement dated November 8, 2000), and that Ms. Sinclair's testimony should be discounted due to her involvement in the action reducing his grade and pay. Nevertheless, their demeanor while testifying, which was relaxed and nonconfrontational, did not suggest to me that they bore any animosity toward the appellant or were fabricating their accounts of the June conversation.

Moreover, any suspicion of bias on the part of Ms. Bunker and Ms. Sinclair is outweighed by my concern about the self-serving nature of the appellant's testimony in this appeal, not only about his June 1997 conversation with Ms. Bunker but also about his contacts with the Board. Although telephone records submitted with his petition for appeal show that he called the Northeastern Regional Office on May 12, 1997, 1AF, Tab 1, I find it improbable that his conversation with the administrative judge occurred as he described it in his testimony. In his written submissions concerning the conversation, for example, he states that he told the administrative judge that he had just received the decision reducing his grade and pay. *Id.*, Tabs 1, 3. Since an appeal would have been timely if he had only recently received the decision, whether the effective date of the action had long since passed or not, his claim that he was advised otherwise is not credible. Similarly, he asserted during his testimony that he made a second call to the Board, after speaking with Ms. Bunker in June 1997, and was again told by an administrative judge that he had missed his appeal deadline. That claim was made for the first time at the hearing.

Thus, I find that even if the appellant was confused by the notice of appeal rights set out in the agency's decision, any confusion he initially experienced was not compounded by information he subsequently received from the Board. I further find that any misunderstanding as to the meaning of the notice was clarified in June 1997 by Ms. Bunker and Ms. Sinclair.

1 therefore conclude that the appellant has not demonstrated that good cause exists for his untimely appeal. The delay in filing the appeal was lengthy, and he did not act with due diligence in the matter.[3] The evidence leads me to suspect that he was less concerned in May 1997 about challenging the reduction in grade and pay than about the retroactive nature of the agency's action and that it was not until other problems surfaced at work that he took greater interest in the matter. Although I have taken into account his pro se status, I also note that he is a professional with a college education. HT1A.

Accordingly, the appeal must be dismissed.

DECISION

The appeal is DISMISSED.

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[3] I reach this conclusion without even taking into account the affidavit of Linda Chambers, another EEO officer, which tends to support the testimony of Ms. Bunker and Ms. Sinclair. RAF, Tab 18.

FOR THE BOARD: "s/_____"
Michael H. Garrety
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on April 6, 2001, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if this initial decision is received by you more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.,
Washington, DC 20419

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be postmarked, faxed, or hand-delivered no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you fail to provide a statement with your petition that you have either mailed, faxed, or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be <u>received</u> by the court no later than 60 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

GEORGE B. RATCLIFF,
Appellant,

DOCKET NUMBER
PH07529804 13-1-2

V.

DEPARTMENT OF THE ARMY,
Agency.

DATE:
JAN 29, 2002

George B. Ratcliff, Glen Burnie, Maryland, pro Se.

Capt. Michael D. Mierau, Jr., Esquire, Fort George G. Meade, Maryland, for the agency.

BEFORE

Susanne T. Marshall, Member
Beth S. Slavet, Member

FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the

Code of Federal Regulations, section 1201.115 *(5* C.F.R. § 1201.115).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. *5* C.F.R. § 120 *1.115(d).* Therefore, we DENY the petition for review. The initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R. § 1201.113.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See*

Pinat v. Office of Personnel Management, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law as well as review other related material at our web site, http://www.mspb.gov.

FOR THE BOARD: "s/_____"
Robert E. Taylor
Clerk of the Board

Washington, D.C.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ORDER

Before MAYER, Chief Judge, MICHEL, Circuit Judge, and DYK, Circuit Judge.

A petition for rehearing having been filed by the PETITIONER, UPON CONSIDERATION THEREOF, it is ORDERED that the petition for rehearing be, and the same hereby is, DENIED.

The mandate of the court will issue on April 8, 2003.

FOR THE COURT,
"s/_____"
Jan Horbaly
Clerk

Dated: April 1, 2003

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUJT
APR -1 2003
JAN HORBALY
CLERK

cc: George B. Ratcliff
Joyce G. Friedman

RATCLIFF V MSPB, 02-3185
(MSPB - PH0752980413-I-2)

****
* Note: Pursuant to Fed. Cir. R. 47.6, this *
* order is not citable as precedent. It is a *
* public record. *
****

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

02-3185

GEORGE B. RATCLIFF,

Petitioner,

V.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

Judgment

ON APPEAL from the MERIT SYSTEMS PROTECTION BOARD

In CASE NO(S). PH0752980413-I-2

This CAUSE having been heard and considered, it is ~~O~~ORDER and ADJUDGED:

AFFIRMED

FILED
U.S. COURT OF APPEALS
FOR THE FEDERAL CIROUIT
APR –8 2003
JAN HORBALY
CLERK

ENTERED BY ORDER OF THE COURT

DATED FEB –5 2003

"s/_____"
Jan Horbaly,
Clerk

ISSUED AS A MANDATE: APR -8 2003

U.S. Const. Amend. V

"No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

5 U.S.C. Sec. 1254(1) - Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

5 U.S.C. Sec. 7512. - Actions covered
This subchapter applies to –

(1) a removal;

(2) a suspension for more than 14 days;

(3) a reduction in grade;

(4) a reduction in pay; and

(5) a furlough of 30 days or less;
but does not apply to -

APPENDIX D

5 U.S.C. Sec. 7513. - Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

(b) An employee against whom an action is proposed is entitled to –

(1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefor at the earliest practicable date.

(c) An agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer provided under subsection (b)(2) of this section.

(d) An employee against whom an action is taken under this section is entitled to appeal to the

Merit Systems Protection Board under section 7701 of this title.

(e) Copies of the notice of proposed action, the answer of the employee when written, a summary thereof when made orally, the notice of decision and reasons therefor, and any order effecting an action covered by this subchapter, together with any supporting material, shall be maintained by the agency and shall be furnished to the Board upon its request and to the employee affected upon the employee's request

5 U.S.C. Sec. 7514. - Regulations

The Office of Personnel Management may prescribe regulations to carry out the purpose of this subchapter, except as it concerns any matter with respect to which the Merit Systems Protection Board may prescribe regulations

5 U.S.C. Sec. 7701. - Appellate procedures

(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right –

(1)to a hearing for which a transcript will be kept; and

(2) to be represented by an attorney or other representative.

Appeals shall be processed in accordance with regulations prescribed by the Board.

5 U.S.C. Sec. 7703. - Judicial review of decisions of the Merit Systems Protection Board

(a)

(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

(2)The Board shall be named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision on the merits on the underlying personnel action or on a request for attorney fees, in which case the agency responsible for taking the personnel action shall be the respondent.

(b)

(1) Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review must be filed within 60 days after the date the petitioner received notice of the final order or decision of the Board.

(2)Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), and section 16(b) of the Fair

Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)), as applicable. Notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702.

(c) In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be -

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence;

except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

(d) The Director of the Office of Personnel Management may obtain review of any final order or decision of the Board by filing, within 60 days after the date the Director received notice of the final order or decision of the Board, a petition for judicial review in the United States Court of Appeals for the Federal Circuit if the Director determines, in his discretion, that the Board erred in interpreting a civil service law, rule, or

regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the Court of Appeals. The granting of the petition for judicial review shall be at the discretion of the Court of Appeals.

REGULATIONS

5 C.F.R. Sec. 250.101 Standards and requirements for agency personnel actions.

In taking a personnel action authorized by this chapter, each agency shall comply with the qualification standards and regulations issued by the Office of Personnel Management, the instructions published by OPM in the Guide to Processing Personnel Actions, and the provisions of any agreement development between OPM and the agency in connection with delegation of a specific authority. When a personnel action is being taken as a result of an order of a Court or a settlement agreement, or a decision or order of or a settlement agreement or an arbitral award reached under the labor arbitration process or the rules and regulations of the Merit Systems Protection Board, the Equal Employment

Opportunity Commission, the Federal Labor Relations Authority, or OPM, the agency shall follow the instructions in the Guide to Processing Personnel Actions, and must comply with all other relevant substantive and documentary requirements, including those applicable to retirement, life insurance, and health benefits.

5 C.F.R. Sec. 511.701 Effective dates generally.

(a) Agency classification actions. (1) A classification action is a determination to establish or change the title, series, grade or pay system of a position based on application of published position classification standards or guides. This is a position action.

(i) The effective date of a position action taken by an agency shall be the date an official with properly delegated authority approves (certifies) the proposed classification. This is accomplished when the authorized official(s) signs the allocation of the position.

(ii) The effective date of a position action may be extended to correspond with the effective date of the personnel action when:

(A) The position is being changed to lower grade or pay; and

(B) The employee occupying the position is eligible for retained grade or pay under 5 U.S.C. 5362-5363.

(2) A position action is implemented by a personnel action. The personnel action must occur within a reasonable period of time following the date of the position action.

(3) If the position action requires a personnel action which will
result in a loss of grade or pay to the occupant of the position, the
agency must advise the employee, in writing, of the position action and the proposed date of the personnel action. This notice shall be issued prior to taking a personnel action.

(4) Except as provided in Sec. 511.703, classification actions may not be made retroactive.

5 C.F.R. Sec. 752.404 - Procedures.

(a) Statutory entitlements. An employee against whom action is proposed under this subpart is entitled to the procedures provided in 5 U.S.C. 7513(b).

(f) Agency decision. In arriving at its decision, the agency shall not consider any reasons for action other than those specified in the notice of proposed action. It shall consider any answer of the employee and/or his or her representative made to a designated official and any medical documentation furnished under paragraph (c) of this section. The agency shall deliver the notice of decision to the employee at or before the time the action will be effective, and advise the employee of appeal rights.

5 C.F.R. Sec. 1201.21 Notice of appeal rights.

When an agency issues a decision notice to an employee on a matter that is appealable to the Board, the agency must provide the employee with the following:

(a) Notice of the time limits for appealing to the Board, the requirements of Sec. 1201.22(c), and the address of the appropriate Board office for filing the appeal;

(b) A copy, or access to a copy, of the Board's regulations;

(c) A copy of the appeal form in appendix I of this part; and

(d) Notice of any right the employee has to file a grievance.

5 C.F.R Sec 1201.22(b)(1997) Filing an appeal and responses to appeals.

(b) Time of filing. An appeal must be filed during the period beginning on the day after the effective date of the action being appealed and ending 30 days after the effective date. An appeal from a final or reconsideration decision that does not set an effective date must be filed within 35 days of the date of the issuance of the decision.

5 C.F.R. Sec 1201.22(b) (1998) Filing an appeal and responses to appeals.

(b) Time of filing. (1) Except as provided in paragraph (b)(2) of this section, an appeal must be filed no later than 30 days after the effective date, if any, of the action being appealed, or 30 days after the date of receipt of the agency's decision, whichever is later. The time for filing is computed in accordance with Sec. 1201.23 of this part. A response to an appeal must be filed within 20 days of the date of the Board's acknowledgment order.

5 C.F.R Sec 1201.154 Time for filing appeal; closing record in cases involving grievance decisions.

Appellants who file appeals raising issues of prohibited discrimination in connection with a matter otherwise appealable to the Board must comply with the following time limits:

(a) Where the appellant has been subject to an action appealable to the Board, he or she may either file a timely complaint of discrimination with the agency or file an appeal with the Board no later than 30 days after the effective date, if any, of the action being appealed, or 30 days after the date of receipt of the agency's decision on the appealable action, whichever is later.

(b) If the appellant has filed a timely formal complaint of discrimination with the agency:

(1) An appeal must be filed within 30 days after the appellant receives the agency resolution or final decision on the discrimination issue; or

(2) If the agency has not resolved the matter or issued a final decision on the formal complaint within 120 days, the appellant may appeal the matter directly to the Board at any time after the expiration of 120 calendar days.

(c) If the appellant files an appeal prematurely under this subpart, the judge will dismiss the appeal without prejudice to its later refiling under Sec. 1201.22 of this part. If holding the appeal for a short time would allow it to become timely, the judge may hold the appeal rather than dismiss it.

5 C.F.R. Sec. 1614.102 Agency program

(3) Designate a Director of Equal Employment Opportunity (EEO Director), EEO Officer(s), and such Special Emphasis Program Managers (e.g., People With Disabilities Program, Federal Women's Program and Hispanic Employment

29 C.F.R. Sec. 1614.107 Dismissals of complaints.

The agency shall dismiss a complaint or a portion of a complaint:

(a) That fails to state a claim under Sec. 1614.103 or Sec. 1614.106(a) or states the same

claim that is pending before or has been decided by the agency or Commission;

(b) That fails to comply with the applicable time limits contained in Secs. 1614.105, 1614.106 and 1614.204(c), unless the agency extends the time limits in accordance with Sec. 1614.604(c), or that raises a matter that has not been brought to the attention of a Counselor and is not like or related to a matter that has been brought to the attention of a Counselor;